PJZ MARINE SERVICES SDN BHD v. TAMSIR SAMSUN

HIGH COURT MALAYA, KUALA LUMPUR
HASNAH MOHAMMED HASHIM J
[SUIT NO: 22NCC-340-04-2013]
1 JUNE 2015

COMPANY LAW: *Directors – Fiduciary duties – Breach of – Relationship of confidence and trust – Conduct, action and deeds of director – Duty to avoid conflicts of interest – Whether director had fiduciary duty to protect company's interest – Whether defendant had personal knowledge of information prejudicial to company – Failure to carry out duty as director in good faith for benefit of company – Whether director had preserved interests of competing company – Whether company proved case against director on balance of probabilities – Exemplary damages – Whether reasonable*

The plaintiff, a private company, filed this action against the defendant, who was at the material time the Chief Operating Officer ('COO') and one of the directors of the plaintiff company, for breach of fiduciary duty against the plaintiff. The cause of action arose from the conduct, action and deeds of the defendant whilst he was still a COO and director of the plaintiff company. The cause of action was premised on a particular contract to provide one self propelled accommodation vessel Marina Star 5 ('Marina Star') with provision to hire ('EMEPMI contract'). The EMEPMI contract was awarded by Exxonmobil to a company, Jeraxis Sdn Bhd ('Jeraxis'). Jeraxis had awarded the EMEPMI contract to the plaintiff on a back to back basis. The plaintiff claimed that it had suffered losses as a result of the defendant's conduct, *inter alia*, that (i) the defendant had concealed from the plaintiff the fact that the Long Term Charter Party ('LTCP') had been executed by Jeraxis with Exxonmobil, which was contrary to the agreed terms. This concealment had prejudiced the plaintiff as it was unable to proceed and complete the purchase transaction and had to continue chartering the vessel; (ii) the defendant's failure or refusal to inform the plaintiff about the defendant's position as a COO in Jeraxis; (iii) the defendant had intentionally taken steps which were necessary or had intentionally failed to take steps necessary, in order to protect or preserve the interests of Jeraxis, which were beyond the duties and responsibilities of the defendant as a director of the plaintiff; (iv) that the defendant had deliberately made attempts to deny the plaintiff's rights to secure financial assistance to acquire the said vessel. The plaintiff prayed, amongst others, for general and exemplary damages, as well as interests and costs as a consequence of the said breach. The defendant, on the other hand, submitted that (i) he did not breach his fiduciary duty and that the defendant had, at all material times, acted *bona fide* and in good faith to procure the contract for the benefit of the plaintiff; and (ii) that the plaintiff

had failed to prove that the defendant had induced the plaintiff to buy the ship in order to obtain secret profit for himself and for Jeraxis. The defendant, therefore, submitted that the allegation of the breach of fiduciary duty as pleaded by the plaintiff was vague and lacking in particulars and had failed to prove that it had suffered any loss or damages.

Held (allowing plaintiff's claim):

(1) As a director of the plaintiff, the defendant must at all times, have undivided loyalty to the plaintiff. It was confirmed by PW4 in evidence that the defendant was in fact the controlling mind or the ultimate decision maker of Jeraxis. The defendant had personal knowledge that the LTCP was executed between Jeraxis and Exxon and the defendant himself had witnessed the said execution. The defendant knew that the plaintiff required the LTCP to be executed for the purposes of obtaining a loan to facilitate the financing of the Marina Star 5 from Thaumas Marine. The concealment had prejudiced the plaintiff resulting in the inability of the plaintiff to proceed and complete the purchase transaction. As a result, the plaintiff had to continue chartering the vessel from Thaumas Marine for the purposes of the Exxommobil contract. The defendant had also failed to disclose or inform the plaintiff of his position and interest in Jeraxis. (paras 59, 61 & 63)

(2) The defendant further breached his fiduciary duty as a director by naming the plaintiff's employees as the employees of Jeraxis to fulfil EMEPMI's requirements for the contract without the consent and knowledge of the plaintiff. The defendant had not acted to protect the interest of the plaintiff but had acted to preserve the interest of a competing company, Jeraxis. As COO and as director of the plaintiff, the defendant had a fiduciary duty to protect the plaintiff's interest and assets. The defendant must accordingly conduct himself loyally and not profit out of his entrusted position. Consequently, the defendant as director of the plaintiff, based on the facts and evidence adduced, was in breach of his fiduciary duties. (paras 63-66)

(3) The defendant as the director of the plaintiff had the duty to avoid conflicts of interest and must, at all times, exercise his powers *bona fide* and in the best interests of the company as a whole. Although directors are vested with powers which carry implicitly some degree of discretion, such powers must be exercised *bona fide*, meaning for the purpose for which they were conferred and not arbitrarily or at the will of the directors, but in the interests of the company. In the instant case, the defendant had failed to carry out his duty as a director in good faith for the benefit of the company. (para 68)

(4) There was sufficient evidence adduced by the plaintiff that the defendant had not acted in the best interest of the plaintiff by not disclosing the executed agreement knowing full well of the background arrangement and by participating and engaging actively with Jeraxis affairs. As a director of the plaintiff, the defendant had a duty to act in the best interest of the company. By not disclosing his interest in Jeraxis, the defendant had acted for a collateral purpose jeopardising the interest of the plaintiff. The defendant should not have put himself in a position where his duty and interests conflicted. The plaintiff had proved its case on a balance of probabilities. (paras 75 & 76)

(5) The plaintiff, however, failed to adduce sufficient evidence to prove that they had suffered or experienced financial loss. In respect of the claim for RM5,430,208.29, PW1 could not even explain or elaborate. The documents supporting the claims were not in any of the bundle of documents. Thus, the sum of RM250,000 as exemplary damages was reasonable. (paras 83 & 86)

(6) The defendant in his counterclaim did not claim any damages for wrongful removal as the COO and director of the plaintiff. The counterclaim was premised on the terms of the working proposal. The defendant did not even tender as evidence the said working proposal. The defendant had failed to prove his counterclaim on the balance of probabilities. Therefore, the defendant's counterclaim was dismissed. (para 87)

Case(s) referred to:

Avel Consultants Sdn Bhd & Anor v. Mohd Zain Yusof & Ors [1985] 2 CLJ 11; [1985] CLJ (Rep) 37 SC ***(refd)***

Bohham-Carter v. Hyde Park Hotel Ltd [1948] 64 TLR 177 ***(refd)***

Dato' Abul Hasan Mohamed Rashid v. Multi-Code Electronics Industries & Anor [2012] 1 LNS 258 ***(refd)***

Ho Hup Construction Company Bhd v. Bukit Jalil Development Sdn Bhd & Ors (No 2) [2012] 1 CLJ 649 HC ***(refd)***

In re City Equitable Fire Insurance Company Limited [1924] 1 Ch 407 CA ***(refd)***

Lee Sau Kong v. Leow Cheng Chiang [1960] 1 LNS 56 HC ***(refd)***

Magnifine Sdn Bhd v. Yap Mun Him [2005] 6 CLJ 413 HC ***(refd)***

Multinational Gas and Petrochemical Co v. Multinational Gas and Petrochemical Services Ltd [1983] Ch 258 ***(refd)***

Pharmmalaysia Bhd v. Dinesh Kumar Jashbhail Nagajibha Patel & Ors [2004] 7 CLJ 465 HC ***(refd)***

Phipps v. Boardman [1966] UKHL 2 ***(refd)***

Pioneer Haven Sdn Bhd v. Ho Hup Construction Company Bhd & Anor And Other Appeals [2012] 5 CLJ 169 CA ***(refd)***

Popular Industries Ltd v. Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***

Regal Hastings Ltd v. Gulliver & Ors [1942] 1 All ER 378 ***(refd)***

Rookes v. Barnard [1964] AC 1129 ***(refd)***

A *The Board of Trustees of the Sabah Foundation & Ors v. Datuk Syed Kechik Syed Mohamed & Anor [2008] 3 CLJ 221 FC* ***(refd)***

Yukilon Manufacturing Sdn Bhd & Anor v. Dato Wong Gek Meng & Ors (No 4) [1998] 4 CLJ Supp 319 HC ***(refd)***

Zulkiply Taib & Anor v. Prabakar Bala Krishna & Ors And Other Appeals [2015] 2 CLJ 766 CA ***(refd)***

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Legislation referred to:
Companies Act 1965, s. 132(1A), (1B)

Other source(s) referred to:
McGregor on Damages, 16th edn, 1997, p 306

C *For the plaintiff/respondent - Hanif Khatri (Amelda Md Din with him); M/s Amelda & Partners*

For the defendant/appellant - Ariff Amirul Abdul Jani; M/s Omar Ismail Hazman & Co

Reported by Suhainah Wahiduddin

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JUDGMENT

Hasnah Mohammed Hashim J:

[1] The plaintiff's claim against the defendant is premised on breach of fiduciary duty which had caused the plaintiff to suffer losses. In its writ and E statement of claim ("SOC"), the plaintiff prayed, amongst others, for general and exemplary damages, as well as interests and costs as a consequence of the said breach.

[2] The defendant disputed the plaintiff's claim and in his defence to the plaintiff's claim, the defendant had filed a counterclaim against the plaintiff F for exemplary damages, as well as interests and costs for terminating him and for not fulfilling the terms of the working proposal dated 28 February 2011.

[3] This case proceeded by way of a full hearing with four witnesses having testified for the plaintiff and three witnesses testified for the defendant.

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Background

[4] The plaintiff, a private company filed this action against the defendant who was at the material time, the chief operating officer ("chief operating officer") ("COO") and one of the directors of the plaintiff company, for H breach of the defendant's fiduciary duty against the plaintiff.

[5] The cause of this present action arises from the conduct, actions and deeds of the defendant whilst he was still a COO and director of the plaintiff's company.

I **[6]** The cause of action is premised on a particular contract described as "Tender No. A 2333385 to provide "one (1) self-propelled accommodation vessel" Marina Star 5 "with Provision to hire during off Monsoon Season"

("EMEPMI contract"). The EMEPMI contract was awarded by ExxonMobil to a company known as Jeraxis Sdn Bhd ("Jeraxis"). By a letter dated 16 June 2012, Jeraxis had awarded the EMEPMI contract to the plaintiff on a back to back basis with the exception of the daily charter rate ("DCR") and the rental for the kitchen galley, which price had been predetermined and agreed by both the plaintiff and Jeraxis.

The Trial

[7] The trial of the High Court proceeded for six days and a total of seven witnesses were called.

[8] The witnesses are as follows:

(i) PW1 - Dato' Adi Munawar bin Al Md Din

(ii) PW2 - Azman bin Mohamad

(iii) SPW3 - Afiqah binti Mohamad

(iv) PW4 - Azhar bin Mohammad

(v) DW1 - Haji Abdul Rauf bin Jasman

(vi) DW2 - Mohd Nasir bin Mohd Shaari

(vii) DW3 - Haji Tamsir bin Samsun

Pleadings For Damages

[9] As far as the pleadings are concerned, the prayers for relief in the statement of claim read as follows:

> Tuntutan Plaintif terhadap Defendan adalah bahawa Defendan telah melakukan pemecahan tanggungjawab fidusiari sebagai Pengarah Syarikat PJZ Marine Services Sdn Bhd yang telah dilakukan semasa Defendan menguruskan urusan-urusan syarikat. Plaintif dengan ini menuntut:
>
> (a) Gantirugi teladan (exemplary damages) atas jumlah RM1 juta atau satu jumlah yang akan ditafsirkan oleh Mahkamah Yang Mulia ini ke atas kausa tindakan kelakuan pecah tanggungjawab fidusiari yang telah dilakukan oleh Defendan, berfaedah pada kadar 4% setahun ke atas jumlah tersebut mulai daripada tarikh penghakiman sehingga ke tarikh penyelesaian penuh.
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> (b) Gantirugi Am atas jumlah RM500,000 atau satu jumlah yang jumlahnya akan ditafsirkan oleh Mahkamah Yang Mulia ini berfaedah pada kadar 4% setahun ke atas jumlah tersebut mulai daripada tarikh penghakiman sehingga ke tarikh penyelesaian penuh.
>
> (c) Kos tindakan ini dan yang bersangkutan dengannya sepertimana yang ditafsirkan oleh Mahkamah Yang Mulia ini; dan

A (d) mana-mana perintah dan/atau relif yang Mahkamah Yang Mulia ini fikirkan adil dan sesuai manfaat.

The Defendant's Defence

[10] The defendant's defence are as follows,

B (a) Defendan telah dilantik sebagai Pengarah Syarikat Plaintif berkuatkuasa 15.11.2011. Defendan pada masa material sekarang bukan lagi Ketua Pegawai Operasi di syarikat Plaintif kerana melalui satu Notice of Non Representation yang disiarkan di akhbar The Star bertarikh 27.10.2012, Plaintif telah menamatkan perkhidmatan Defendan.

C (b) Defendan tidak pernah merepresentasikan kepada EMEPMI bahawa Jeraxis merupakan tuan punya kapal Marina Star 5.

(c) Berdasarkan kepada hubungan baik di antara Jeraxis dan Defendan sendiri, Jeraxis pada waktu itu menawarkan keutamaan kepada Plaintif berkenaan untuk memberi peluang perniagaan baru
D berkaitan dengan kontrak EMEPMI.

(d) Defendan tidak mempunyai pengetahuan berkenaan jumlah perbelanjaan bagi tujuan 'retro fitting' sebanyak RM4,410,543.63.

(e) Defendan selanjutnya menyatakan bahawa pada masa material,
E status perjanjian LTCP tersebut masih belum dimeterai kerana pihak Jeraxis hanya menandatangani perjanjian tersebut pada waktu itu, Oleh yang demikian, perjanjian LTCP di antara Jeraxis dan EMEPMI pada 16.8.2012 masih belum termeterai. Perjanjian tersebut hanya termeterai dan distem pada 16.10.2012.

F (f) Defendan selanjutnya menyatakan bahawa Plaintif pada masa material, telah menghubungi Jeraxis bagi mendapatkan kontrak catering kapal tersebut dan sekiranya ia tidak ditawarkan kepada Plaintif, maka Plaintif akan menarik diri daripada kontrak LTCP EMEPMI tersebut. Walau bagaimanapun, Jeraxis memaklumkan kepada Plaintif bahawa kontrak catering bagi kapal tersebut tidak
G boleh diberikan kepada Plaintif kerana melalui surat tawaran bertarikh 16.6.2012, adalah jelas bahawa tawaran tersebut tidak merangkumi kontrak catering bagi kapal tersebut. Ini adalah jelas satu tindakan *mala fide* oleh Plaintif bagi mengaut keuntungan yang berlebihan.

H (g) Plaintif hanya mempunyai lesen untuk Fast daripada Petronas tetapi tidak mempunyai lesen untuk Accommodation Vessel atau Work Barge. Selain itu, Plaintif tiada lesen catering bagi kapal tersebut dan jikalau kerja-kerja catering diberikan kepada Plaintif, kerja-kerja catering tersebut akan diberikan kepada pihak lain yang mempunyai lesen catering.

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(h) Plaintif hanya memperolehi lesen Accommodation Vessel atau Work Barge pada Disember 2012 selepas Exxon Mobil mengemukakan tender pada bulan Mac 2012 dan diawardkan kepada Jeraxis pada Jun 2013.

(i) Defendan tidak pernah pada bila-bila masa dilantik menjadi "COO" Syarikat Jeraxis. Jawatan "COO" yang digunakan adalah sepertimana telah dipersetujui bagi tujuan projek dan telah diluluskan sepertimana Carta Organisasi.

(j) Plaintif berada di ambang kerugian dan tidak membuat sebarang keuntungan. Defendan dipelawa untuk menyertai Plaintif dan membantu Plaintif mengatasi kerugian serta mendapatkan kontrak-kontrak yang mana Defendan berjaya mendapatkan kontrak-kontrak tersebut atas dasar hubungan baik Defendan dan pihak yang lain usaha kerja keras Defendan sendiri.

(k) Defendan telah, bagi pihak Jeraxis 'sign-off' e-mail sebagai Chief Operating Officer melalui e-mail yang dihantar pada 5.9.2012 kepada EMEPMI. Ini dilakukan kerana pada waktu itu, kontrak EMEPMI tersebut hanyalah melibatkan Jeraxis dan EMEPMI, dan bukan Plaintif. Defendan telah berbuat demikian bagi melindungi kepentingan Plaintif kerana pihak-pihak yang "privy to the contract" dengan EMEPMI hanyalah Jeraxis dan Plaintif tidak mempunyai hubungan secara langsung dengan EMEPMI pada waktu itu.

(l) Defendan menyatakan bahawa Defendan tidak pernah menerima sebarang notis pemberitahuan bahawa Defendan telah disingkirkan daripada Plaintif sebagai Pengarah Syarikat. Defendan hanya mengetahui bahawa Defendan telah disingkirkan oleh Plaintif setelah melihat Notis Pemberitahuan bertarikh 27.10.2012 yang disiarkan di akhbar The Star. Defendan seterusnya menyatakan bahawa Defendan telah disingkirkan sebagai Pengarah Syarikat melalui satu prosedur yang salah.

(m) Defendan selanjutnya menyatakan bahawa kontrak EMEPMI yang sepatutnya telah dimeterai antara Jeraxis dan EMEPMI telah dibatalkan pada masa material. Plaintif kemudiannya telah mendapatkan kontrak tersebut secara terus dengan EMEPMI dengan menawarkan kapal yang sama iaitu Marina Star 5 tanpa melalui back to back agreement dengan Jeraxis. Di dalam keadaan sedemikian, Plaintif tidak mengalami sebarang kerugian, malahan mendapat keuntungan disebabkan pembatalan kontrak di antara Jeraxis dan EMEPMI tersebut. Oleh yang demikian, Defendan menyatakan bahawa Defendan tidak melanggar sebarang tanggungjawab fidusiarinya terhadap Plaintif.

[11] The Counterclaims

(a) Gantirugi teladan atas jumlah yang akan ditaksirkan oleh Mahkamah Yang Mulia ini ke atas tindakan Plaintif yang tidak mematuhi Working Proposal bertarikh 28.2.2011 tersebut dengan kadar faedah 4% setahun ke atas jumlah tersebut bermula daripada tarikh penghakiman sehingga ke tarikh penyelesaian penuh.

A (b) Gantirugi am atas jumlah yang akan ditaksirkan oleh Mahkamah Yang Mulia ini dengan faedah 4% setahun atas jumlah tersebut bermula daripada penghakiman sehingga ke tarikh penyelesaian penuh.

(c) Kos tindakan dan mana-mana perintah atau relif yang lain yang difikir suai manfaat oleh Mahkamah Yang Mulia ini.

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Issue

[12] The main issue to be determined is whether the defendant breached his fiduciary duty as a director and COO of the plaintiff's company.

C **The Plaintiff's Case**

[13] In its written submission, the plaintiff summarised its claim against the defendant for breach of fiduciary duties due to the following:

(i) Failed to inform the plaintiff that the Long Term Charter Party (LTCP) between ExxonMobil and Jeraxis had been executed by Jeraxis on 16 August 2012 despite being asked by another director of the plaintiff company, Dato' Adi Munawar bin Hj Md Din (PW1) on numerous occasion (para. 11.5, 12, 12.1 of the amended statement of claim). In fact, the defendant had concealed from PW1 and/or the plaintiff, the fact that the Long Term Charter Party (LTCP) had been executed by Jeraxis with ExxonMobil, when he had actual personal knowledge of the same fact, as he witnessed the signing of the LTCP on behalf of Jeraxis on 16 August 2012 (at p. 262 bundle of documents (BOD) - B2).

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(ii) The defendant's failure and/or refusal to disclose and/or inform the plaintiff about the defendant's position and/or interest in Jeraxis including but not limited to his position as a COO in Jeraxis; (para. 13.1(a) and 15.1 of the amended statement of claim).

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(iii) The defendant had intentionally taken steps which are necessary and/or intentionally failed to take steps necessary, in order to protect and/or preserve the interests of Jeraxis, which are beyond the duties and responsibilities of the defendant as a director of the plaintiff.

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(iv) The defendant deliberately attempted to prevent or deny the plaintiff's rights to secure the financial assistance to acquire the ownership of Marina Star 5.

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(v) The defendant intentionally committed (ii), (iii) and (iv) above for the purpose of obtaining ownership on Marina Star 5 whether directly or indirectly.

(vi) The defendant intentionally induced the plaintiff to invest at a level of loss.

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[14] The plaintiff contended that the defendant failed to inform the plaintiff of the LCTP entered between ExxonMobil and Jeraxis on 16 August 2012. The defendant had personal knowledge and deliberately made attempts to deny the plaintiff's rights to secure financial assistance to acquire the said vessel.

[15] Learned counsel for the plaintiff submitted that the evidence adduced proved that the defendant had personal and actual knowledge of the fact that the LTCP between Jeraxis and Exxon had been executed on 16 August 2012 and that the defendant himself had witnessed the execution. This fact was not disputed by the defendant,

> Q: Apa berlaku pada 6 Ogos 2012?
>
> A: EMEPMI telah hantar kontrak asal Long term Charter Party (LCTP) untuk semakan dan tandatangan kepada Jeraxis dan Jeraxis telah hantar semula kepada EMEPMI pada 16 Ogos untuk tandatangan dan stamping.

(Re: Q/A17 WS/DW3).

[16] It is submitted that it was crucial that the LTCP be executed between the plaintiff and Jeraxis for the purposes of obtaining a loan to facilitate the financing of the vessel Marina Star. The plaintiff chartered the vessel from Thaumas Marine Ltd for a period of three months commencing from 9 July 2012. At that material time, the defendant was the plaintiff's officer in charge of making the necessary applications for financing of the vessel on behalf of the plaintiff.

[17] The concealment of the execution of the LCTP between Jeraxis and Exxon is a breach of the defendant's duty as COO and director of the plaintiff. It is the submission of the plaintiff that if it had known of the execution of the LTCP, it would have considered other options that may have been available. The concealment by the defendant of the execution of the LTCP had prejudiced the plaintiff as it was unable to proceed and complete the purchase transaction and had to continue chartering the vessel.

[18] In his witness statement, PW1 had stated that he was unaware and had no knowledge of the submission of tender by Jeraxis for the Exxon project but was informed by the defendant himself that the defendant had a good relationship with Jeraxis:

> A: ... apa yang saya dimaklumkan oleh Defendan iaitu sebelum tawaran diawardkan oleh Exxon kepada Jeraxis bahawa beliau mempunyai hubungan baik dengan syarikat Jeraxis di mana seorang pengarah adalah rakan kenalan beliau semasa sekolah lagi, manakala seorang lagi Pengarah adalah abang tiri Defendan.

(Re: Q/A 32 WS/PW1).

[19] The defendant, however did inform him that because of the good relationship that he has with Jeraxis the plaintiff would be able to secure projects from Jeraxis:

> A: Defendan memaklumkan kepada saya pada sekitar awal bulan Jun 2012 bahawa berdasarkan hubungan 'baik' antara Defendan dengan Jeraxis, Defendan telah menggambarkan potensi bagi syarikat Plaintif untuk mendapatkan sub-projek tersebut daripada Jeraxis ... Pada ketika itu saya bersetuju kepada cadangan Defendan untuk membeli Marina Star 5.

(Re: Q/A 32 WS/PW1).

[20] PW1 gave evidence that he was unaware of the defendant's role in Jeraxis:

> A: Saya pada tahap itu, saya tidak mempunyai pengetahuan langsung mengenai kepentingan peribadi Defendan di dalam syarikat Jeraxis ... Saya tidak tahu bahawa beliau adalah COO syarikat Jeraxis.

(Re: Q/A 32 WS/PW1).

[21] PW1 only came to know of the defendant's role/position in Jeraxis through one Azman Mohamad (PW2), a consultant appointed by the plaintiff. The defendant never denied that he was in fact the COO of Jeraxis but had stated in evidence that it was with the consent of the plaintiff. It is the submission of the plaintiff that no consent was given by the plaintiff to the defendant. The defendant failed to adduce any documentary proof that he had obtained the plaintiff's consent. Furthermore, the organisation chart prepared by the defendant was done without the plaintiff's consent.

[22] PW4, was the CEO of Jeraxis in 2012 and confirmed in evidence that he was appointed as a director of Jeraxis to replace the defendant in 2008. In his witness statement (Re: Q/A3) he said that the shareholders of Jeraxis at that time were the defendant and Haji Abdul Rauf. He was also named as a shareholder and held 40% of the shareholding. He explained in his witness statement:

> A: Jumlah pemegangan saham di mana saya dinamakan sebagai pemegang saham adalah 40% syarikat ... maksud saya ... kesemua 40% saham di dalam syarikat Jeraxis yang diletakkan di atas nama saya adalah sebenarnya milik Hj. Tamsir. Saya diminta oleh Hj. Tamsir untuk memegang saham itu bagi pihaknya ...

(Re: Q/A4 & 5 WS/PW4)

The Defendant's Case

[23] The defendant's version, on the other hand, was that he did not breach his fiduciary duty. The contract executed was for the benefit of the plaintiff. Jeraxis was owned by his step brother. The defendant had merely convinced or persuaded his step brother to give the plaintiff an opportunity to participate in the project as it will bring huge profits.

[24] It is submitted by learned counsel for the defendant that the plaintiff failed to adduce any evidence that the defendant made secret profits for himself and Jeraxis in the procurement of the project. There is no evidence that the defendant had breached his fiduciary duty as the plaintiff's director.

[25] It is the submission of learned counsel that the defendant had in fact disclosed to the plaintiff of his relationship with Jeraxis. PW1 himself had agreed that the defendant, on behalf of the plaintiff will negotiate the deal with Jeraxis. The defendant had introduced DW1 to PW1 upon his request,

> A: Sebenarnya perjumpaan di atas request Dato Adi, dan saya rasa dia sangat baiklah sebab sekarang ada projek, jadi kita kena open up lah sebenarnya on the table, kalau, kalau PJZ bersetuju bekerjasama dengan Jeraxis ...

[26] The defendant in his witness statement told the court that:

> Saya telah membawa dan memperkenalkan abang saya kepada Dato Adi ... Dan berbincang tentang potensi Jeraxis dan PJZ Marine untuk bekerjasama untuk kontrak EMEPMI dan kapal accomodation vessel. Ini kerana Jeraxis mempunyai lesen accommodation vessel dari PETRONAS.

(Re: Q/A 10 WS/DW3)

[27] It is also contended by the defendant that there is no documentary proof that the defendant held shares in Jeraxis when the contract was executed.

[28] With regards to the defendant representing himself as the COO of Jeraxis, it is submitted that it was merely indicted on the organisation chart for the purpose of the project. Furthermore, the plaintiff failed to prove the allegation that the defendant had in fact represented himself as COO of Jeraxis.

[29] It is further submitted that the defendant had, at all times, acted *bona fide* and in good faith to procure the contract for the benefit of the plaintiff. The plaintiff failed to prove that the defendant had induced the plaintiff to buy the ship in order to obtain secret profit for himself and for Jeraxis. The plaintiff knew that by purchasing the vessel, the company will ultimately reap profit from the project. The agreement between the plaintiff and Jeraxis was on a back to back basis with both parties to profit from such an arrangement.

[30] The defendant explained during cross-examination that the reason to register Jeraxis in the provisional certificate is because the main contract holder is Jeraxis and was done upon the advice of Exxon.

[31] The main reason, according to the defendant, the plaintiff was not awarded the kitchen galley contract was because the plaintiff did not possess the necessary vessel catering licence.

[32] It is the submission of the defendant that the plaintiff failed to adduce any evidence that the defendant had attempted to siphon the vessel and this was agreed by PW1 during cross-examination:

> Q: ... Sama ada kapal tersebut diambil alih ataupun dibawa lari ... oleh Jeraxis.
>
> A: Tak ada.

[33] Learned counsel further submitted that the plaintiff was wrong in removing the defendant as a director as the plaintiff failed to comply with arts. 69 and 106 of the articles of association. There is also no board of directors resolution of the removal of the defendant as a director adduced as evidence. Therefore, it is contented that the plaintiff had wrongfully terminated the defendant as a director of the plaintiff.

[34] It is further submitted that the allegation of the breach of fiduciary duty as pleaded by the plaintiff is vague and lacking in particulars. The plaintiff has failed to prove that it had suffered any loss or damages.

Evaluation Of Evidence And Decision

[35] The defendant was appointed as the COO of the plaintiff commencing from 1 April 2011 and subsequently appointed as a director on 15 November 2011.

[36] By a letter dated 15 June 2012, EMEPMI accepted the offer by Jeraxis to provide the self-propelled accommodation vessel for the project. Jeraxis then awarded the plaintiff the aforesaid contract on a back to back basis with an intention to execute a long term charter party with EMEPMI to provide the accommodation vessel.

[37] The salient terms of the award/charter are as follows:

(i) PJZ is to charge the daily charter rate on time charter basis at RM65,000 per day for the duration of contracts of three years with option of one year extension;

(ii) PJZ is to charge monthly rental of kitchen galley and mess area at RM25,000 per months to the contractor's caterer;

(iii) PJZ is to procure the vessel Marina Star 5 from the owner; Thaumas Marine Ltd of which 5% reservation amount of USD 782,500 is payable by 18 June 2012 as per attached invoice. Thereafter PJZ shall enter into memorandum of agreement to finalise the purchase, to be the owner of the vessel and manage the vessel as per the EMEPMI requirements;

(iv) PJZ and Jeraxis shall enter into long term charter party as per the EMEPMI save for the item i and ii above.

[38] The plaintiff, the defendant and Thaumas Marine Ltd ("Thaumas Marine") entered into an agreement on 9 July 2012 whereby Thaumas agreed to sell to the plaintiff the accommodation vessel. The said vessel will then be chartered to Jeraxis for the purpose of carrying out the project. The plaintiff agreed to take delivery and charter the vessel from Thaumas Marine on bareboat basis for three months. One of the terms agreed by the parties is that the plaintiff and Jeraxis shall enter into a LTCP.

[39] However, without the knowledge of the plaintiff, the LTCP was executed between EMEPMI and Jeraxis on 16 August 2012 contrary to the agreed terms. The defendant knew and had himself witnessed the execution of the LTCP.

The Statutory Provisions

[40] Section 132(1) of the Companies Act 1965 (CA) provides as follows:

> ... A director of a company shall at all times exercise his powers for a proper purpose and in good faith in the best interest of the company.

[41] Section 132(1A) of the same Act further provides:

> ... a director of a company shall exercise reasonable care, skill and diligence with:
>
> (a) The knowledge, skill and experience which may reasonably be expected of a director having the same responsibilities; and
>
> (b) Any additional knowledge, skill and experience which the director in fact has.

[42] Section 132(1B) of the CA provides:

> A director who makes a business judgment is deemed to meet the requirements of the duty under subsection (1A) and the equivalent duties under the common law and in equity if the director:
>
> (a) Makes the business judgment in good faith for a proper purpose;
>
> (b) Does not have a material personal interest in the subject matter of the business judgment;
>
> (c) Is informed about the subject matter of the business judgment to the extent the director reasonably believes to be appropriate under the circumstances; and
>
> (d) Reasonably believes that the business judgment is in the best interests of the company.

Fiduciary Duty

[43] The word 'fiduciary' has its roots in the Latin word *fiducia*, which means confidence. A fiduciary relationship is a relationship of confidence and the person in whom confidence is reposed within that relationship is

referred to as the fiduciary. The essence of fiduciary obligation is that the fiduciary is precluded from acting in any other way than in the interests of the person to whom the duty to so act is owed.

[44] The Supreme Court in *Avel Consultants Sdn Bhd & Anor v. Mohd Zain Yusof & Ors* [1985] 2 CLJ 11; [1985] CLJ (Rep) 37 held:

> The law is clear that a director of a company is in fiduciary relationship with his company and as such he is precluded from acting in a manner which will bring his personal interest into conflict with that of his company.

[45] The obligation of a fiduciary is the obligation of loyalty and fidelity. The nature of the fiduciary obligation is, amongst others, to act in good faith based on a relationship of trust and confidence. The Federal Court in its judgment in the case of *The Board of Trustees of the Sabah Foundation & Ors v. Datuk Syed Kechik Syed Mohamed & Anor* [2008] 3 CLJ 221 (at p. 244) states as follows:

> In law the position of the fiduciary and his obligation have been succinctly stated by Millet LJ in the English case of *Bristol and West Building Society v. Mathew* [1988] Ch 1 to be as follows:
>
> > A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary.
>
> > The nature of the obligation determines the nature of the breach. The various obligations of a fiduciary merely reflect different aspects of his core duties of loyalty and fidelity. Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity. Mere competence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty.

[46] It is implicit that in the discharge of his duties as a fiduciary, the defendant owed a duty of care to the plaintiff to act in the best interest of the plaintiff. Abdul Malik Ishak J explained in the case of *Pharmmalaysia Bhd v. Dinesh Kumar Jashbhail Nagajibha Patel & Ors* [2004] 7 CLJ 465, that the law clearly provides as follows:

(1) that the director holds a fiduciary position in the company;

(2) and he must exercise the powers vested in him as a director in the interests of the company;

(3) and he must not exercise those powers as a director against the interests of the company; and

(4) in exercising those powers by virtue of his position as a director he must always do so for the general interests of the company and nothing else.

[47] In *Ho Hup Construction Company Bhd v. Bukit Jalil Development Sdn Bhd & Ors (No. 2)* [2012] 1 CLJ 649. Justice Mah Weng Kwai referred to the case of *In re City Equitable Fire Insurance Company Limited* [1924] 1 Ch 407 CA where Romer J said that:

"In discharging those duties, a director (a) must act honestly, and (b) must exercise such degree of skill and diligence as would amount to the reasonable care which an ordinary man might be expected to take, in the circumstances, on his own behalf. But, (c) he need not exh. in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience; in other words, he is not liable for mere errors of judgment; (d) he is not bound to give continuous attention to the affairs of his company; his duties are of an intermittent nature to be performed at periodical board meetings, and at meetings of any committee to which he is appointed, and though not bound to attend all such meetings he ought to attend them when reasonably able to do so; and (e) in respect of all duties which, having regard to the exigencies of business and the articles of association, may properly be left to some other official, he is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly.

[48] Walter Woon on *Company Law* states that:

Firstly, a director must act in what he honestly considers to be the company's interests and not in the interests of some other person or body. This is a director's main and overriding duty at common law; Secondly, a director must employ the powers and assets that he is entrusted with for proper purposes and not for any collateral purpose; Thirdly, a director must not place himself in a position whereby his duty to the company and his personal interests may conflict.

[49] In *Pioneer Haven Sdn Bhd v. Ho Hup Construction Co Bhd & Anor and Other Appeals* [2012] 5 CLJ 169; [2012] 3 MLJ 616 at 654 the Court of Appeal held that s. 132(1) and 132(1A) do not alter the law in this area but enhanced the common law duty of care and equitable fiduciary duties. At paras. 228-229, p. 216 (CLJ); para. 233, p. 654 (MLJ) the court said:

... The prior provision of s. 132(1) requires a director to act honestly. The current s. 132(1) of the Act, requires a director to act in good faith in the best interests of the company. It is accepted that for all intents and purposes, the scope of the directors' duties to act honestly under the old

A s. 132(1) and the new s. 132(1) are the same. Thus the old case law relating to the duty to act honestly continues to be relevant (see *Cheam Tat Pang v. Public Prosecutor* [1996] 1 SLR 541).

It is also recognised that the duty to act in the best interests of the company means different things, depending on the factual circumstances

B ...

[50] As director and COO of the plaintiff, the defendant obviously holds a fiduciary position in the aforesaid plaintiff company. The defendant must, at all time, exercise the powers vested in him as a director of the plaintiff honestly and diligently. Thus, the defendant is precluded from acting in a

C manner which will bring his personal interest into conflict with that of the plaintiff. The law requires the defendant as a director of the plaintiff to act and behave as follows:

(i) exercise the powers vested as a director in the interests of the company;

D

(ii) must not exercise those powers as a director against the interests of the company; and

(iii) in exercising those powers by virtue of his position as a director he must always do so for the general interests of the company and nothing else.

E

Full And Frank Disclosure

[51] In *Magnifine Sdn Bhd v. Yap Mun Him* [2005] 6 CLJ 413, Richard Malanjum J (as he then was) held at pp. 423-424:

F As a fiduciary the defendant was obliged to make a full and frank disclosure of not only the fact that he was being paid but also as to the amount. Indeed even with a full and frank disclosure the no-conflict rule and no-profit rule would not have excused or exempted him from his fiduciary duty to act *bona fide* in the interest of the plaintiff and for proper purposes. (See: *Neptune (Vehicle Washing Equipment) Ltd v. Fitzerald (No. 2)* [1995] BCC 1000; *Bray v. Ford* [1896] AC 44).

G

... It is trite law that directors are fiduciaries and as such they are subject to the no-conflict principle in equity. They are not allowed to put themselves in a position where their duties conflict with their interests. And 'the taking of commissions or bribes or any kind of undisclosed benefits by a director from any party with which a company is dealing with

H is the most obvious form of conflict between duty and interests or the making of secret profits' – *Corporate Powers Accountability* by Loh Siew Cheang (2nd edn). (See also: *Tan Kiong Hwa v. Andrew SH Chang* [1974] 1 LNS 168; [1974] 2 MLJ 188: *Boston Deep Sea Fishing and Ice Company v. Ansell* [1888] 39 Ch 339; *Fur Ltd v. Tomkies* [1936] 54 CLR 583).

I

The Non Disclosure Of His Appointment As COO Of Jeraxis

[52] The defendant in evidence stated that he had disclosed to the plaintiff of his relationship with the directors of Jeraxis ie, his step brother and close friend. However, the plaintiff's director, PW1, gave evidence that he was unaware that the defendant had personal interest in Jeraxis and that the defendant was also the COO of that company. PW1 also confirmed in evidence that the plaintiff did not give any form of consent to the defendant to be appointed as COO of Jeraxis.

[53] The defendant represented himself to be the owner of Jeraxis. This is confirmed through the evidence of PW2. In his witness statement he stated,

> Defendan telah memperkenalkan diri beliau sebagai 'owner' Jeraxis.

[54] In the statement of defence, the defendant denied that he was the COO of Jeraxis. However, during cross-examination, the defendant did not deny that he was the COO of Jeraxis and said it was with the consent and knowledge of the plaintiff,

> Saya pada Julai 2012 telah mengetuai penyediaan dan perlaksanaan kontrak di antara Jeraxis dan EMEPMI dengan menggunakan jawatan Chief Operating Officer Jeraxis dengan pengetahuan PJZ.

[55] PW1 gave evidence that he was not told that the defendant was the COO of Jeraxis. By an e-mail dated 18 August 2012 to ExxonMobil, the defendant had represented himself as COO of Jeraxis:

> Dear Cpt Lim,
>
> Allow me to submit our apology on their behalf of not responding to you immediately.
>
> I am very concern about Marina Star Safety issues and looking forward for such a training.
>
> Please register me for the training as below.
>
> Name: Tamsir Bin Samsun
> NRIC: 651210-10-6137
> Designation: Chief Operating Officer
> Contact No +60193126461
>
> E-mail tamsir@jeraxis.com or tamsir.samsun@gmail.com
> Thank You again for the invitation.
> Best Regards and Selamat Hari Raya, maaf zahir dan batin from us.
>
> Tamsir Samsun
> COO
> Jeraxis Sdn Bhd
> Sent from my Blackberry®wireless device via Vodafone-Celcom Mobile.

[56] In the circumstances based on the evidence, this court finds that the defendant as the COO of the plaintiff and having been placed in the position of trust and confidence by the directors owed fiduciary duties to the plaintiff. The defendant's failure to disclose that he had an interest and control of Jeraxis amount to a breach of his fiduciary duty. No evidence was adduced by the defendant that he had obtained the plaintiff's consent to include the employees of the plaintiff in the organisation chart of Jeraxis.

The Non Disclosure Of The Execution Of The LTCP

[57] The non disclosure and concealment of the execution of the TCP by the defendant affected the plaintiff. The plaintiff was unable to complete the purchase transaction and had to continue chartering the vessel from Thaumas Marine to provide for the ExxonMobil contract.

[58] The defendant did not adduce any evidence that there was consent from the plaintiff or any other documentary proof to support this allegation of consent having been given for him to proceed with the LTCP.

[59] As a director of the plaintiff, the defendant must at all times have undivided loyalty to the plaintiff. PW4 confirmed in evidence that the defendant was in fact the controlling mind or the ultimate decision maker of Jeraxis. In his witness statement, PW4 stated that Jeraxis was established sometime in 2005 by the defendant and one Hj Rauf as shareholders. He gave evidence that there was a trust document but all copies were given to the defendant. PW4 gave evidence that all decisions in Jeraxis were made by the defendant who was also the person that prepared the tender documentations of the project on behalf of Jeraxis.

[60] It is the evidence of the defendant that one Encik Helmi and Encik Halim of Jeraxis were in fact the persons responsible for the preparation of the tender documents and the operation of the project. However, neither Encik Halim or Encik Helmi were called as witness by the defendant to support this contention that the Exxon project were operated and managed by them.

[61] The defendant had personal knowledge that the LTCP was executed between Jeraxis and Exxon on 16 August 2012. The defendant himself had witnessed the execution of the said LTCP. The plaintiff had entered into an agreement with the ship owner at that material time to purchase the vessel for USD21,130,000.

[62] The defendant knew that, at that particular time, the plaintiff required the LTCP to be executed for the purposes of obtaining a loan to facilitate the financing of the Marina Star 5 from Thaumas Marine. The plaintiff had chartered the vessel from Thaumas Marine for three months. The defendant was the plaintiff's officer who was in charge of making the necessary applications to various banks and financial institutions to purchase the Marina Star 5.

[63] The concealment had prejudiced the plaintiff resulting in the inability of the plaintiff to proceed and complete the purchase transaction. As a result, the plaintiff had to continue chartering the vessel from Thaumas Marine for the purposes of the ExxonMobil contract. Based on the evidence, the defendant had failed to disclose or inform the plaintiff of his position and interest in Jeraxis. The defendant further breached his fiduciary duty as a director by naming the plaintiff's employees as the employees of Jeraxis to fulfil EMEPMI's requirements for the contract without the consent and knowledge of the plaintiff. The catering business was awarded to Jeraxis who had then subcontracted it to another company and this was admitted by the defendant in evidence. The defendant explained that he did so because he was of the view that the plaintiff is inexperienced. This clearly shows that he had not acted in the interest of the plaintiff.

[64] The defendant had not acted to protect the interest of the plaintiff but based on his conduct, as well as the oral and documentary evidence, he had acted to preserve the interest of a competing company, Jeraxis.

[65] In the organisation chart prepared by the defendant at the request of EMEPMI, the defendant had included the employees of the plaintiff without the knowledge or consent of the plaintiff. As COO and as director of the plaintiff, the defendant has a fiduciary duty to protect the plaintiff's interest and assets. Consequently, the defendant as director of the plaintiff, based on the facts and evidence adduced, would be in breach of his fiduciary duties.

[66] The defendant must accordingly conduct himself loyally and not profit out of his entrusted position. In *Yukilon Manufacturing Sdn Bhd & Anor v. Dato Wong Gek Meng & Ors (No 4)* [1998] 4 CLJ Supp 319; [1998] 7 MLJ 551, Abdul Malik Ishak J (as he then was) held at p. 354 (CLJ); p. 582 (MLJ) quoting *Regal Hastings Ltd v. Gulliver & Ors* [1942] 1 All ER 378 that:

> "Both in equity and trust, it has been held that, if a person in a fiduciary relationship make a secret profit out of the relationship, the court will not inquire whether the person is damnified or has lost a profit which otherwise he would have got. The fact is in itself a fundamental breach of the fiduciary relationship."; see also *Pertamina v. Kartika Ratna Thahir & Ors* [1982] 1 LNS 61; [1983] 1 MLJ 136.

[67] Justice Abdul Malik Ishak in *Dato' Abul Hasan Mohamed Rashid v. Multi-Code Electronics Industries & Anor* [2012] 1 LNS 258 referred to the case of *Multinational Gas and Petrochemical Co v. Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258, [1983] 2 All ER 563, where it was held that:

> The directors indeed stand in a fiduciary relationship to the company, as they are appointed to manage the affairs of the company and they owe fiduciary duties to the company though not to the creditors, present or future, or to individual shareholders.

A The directors' duties to act in what they consider to be in the best interests of the company must be qualified by the proviso that they must not act for any collateral purpose (*In re Smith And Fawcett, Limited* [1942] Ch 304, CA, [1942] 1 All ER 542, CA). It must be borne in mind that the powers given by the articles to the directors are held in trust for the company and must not be exercised for any purpose other than that for B which the power was conferred. If the powers are wrongly exercised, the transaction may be set aside notwithstanding the directors' assertions that they honestly believed it to be in the best interests of the company (*Howard Smith Ltd v. Ampol Petroleum Ltd And Others* [1974] AC 821, PC, [1974] 1 All ER 1126, PC).

C **[68]** The defendant as the director of the plaintiff has the duty to avoid conflicts of interest and must, at all times, exercise his powers *bona fide* and in the best interests of the company as a whole. The essence of the fiduciary duty is a duty to act *bona fide* at all times in the interests of the company and not for a collateral purpose. Although directors are vested with powers which D carry implicitly some degree of discretion, such powers must be exercised *bona fide*, meaning for the purpose for which they were conferred and not arbitrarily or at the will of the directors, but in the interests of the company. In the instant case, the defendant has failed to carry out his duty as a director in good faith for the benefit of the company.

E **[69]** The catering business was awarded to Jeraxis. The said contract was then subcontracted to another company, Aquarius Sdn Bhd. As a director of the plaintiff, the defendant should have tried to improve the services instead of the contract being subcontracted to another company. The reason, according to the defendant, was because he found out that the services F provided by the plaintiff was not satisfactory,

> ... saya dapati perkhidmatan makanan fast crew boat yang disediakan oleh PJZ tidak memuaskan ... .
>
> (Re: Q/A24 WS/DW3)

G **[70]** It is trite law that a person in a fiduciary position is not entitled to make a profit and he is not allowed to put himself in a position where his interest and duty are in conflict. In *Phipps v. Boardman* [1966] UKHL 2, Lord Hodson explained the rule as follows:

> Thus, the rule of equity is that if a person obtains a profit from his H fiduciary position he is accountable for that profit. The liability arises from the mere fact of a profit having been made and that the fiduciary, however honest and well intentioned, cannot escape the risk of being called upon to account. This is how Lord Guest put it in *Phipps v. Boardman* at p. 1060:
>
> > The position of a person in a fiduciary capacity is referred to in I *Regal (Hastings) Ltd v. Gulliver* by Lord Russel of Killowen where he said:

> My Lords, with all respect I think there is a misapprehension here. The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of *bona fides*; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account. (emphasis added).

[71] It is implicit that in the discharge of his duties as a fiduciary, the defendant, as a director owed a duty of care to the plaintiff to act in the best interest of the plaintiff. The defendant being a fiduciary to the plaintiff must not place himself in a position where his duty and his interest may conflict. As a COO and a director of the plaintiff, the defendant has a fiduciary duty to protect the plaintiff's interest. If it was done in the interest of the plaintiff, there is absolutely no reason for the defendant to have conducted himself surreptitiously.

Removal As Director Of The Plaintiff

[72] It is contended by the defendant that he was wrongly removed as a director of the plaintiff. The plaintiff had issued a "Notis Pemberitahuan - Penyingkiran sebagai Pengarah Syarikat Dalam PJZ Marine Services Sdn Bhd." dated 12 October 2012 (p. 67, B1). The said notice notified the defendant that a resolution to remove him as a director of the plaintiff will be tabled for approval with effect from 26 October 2012,

> Satu resolusi biasa untuk menyingkirkan tuan dari Lembaga Pengarah akan dibentangkan untuk kelulusan ... .

[73] The defendant was also notified of the reasons for his removal,

> (i) Didapati pihak tuan telah melakukan perihal pecah amanah melalui penyalahgunaan kuasa sebagai Pengarah Syarikat PJZ Marine Services Sdn. Bhd. Pihak syarikat telah mendapati terdapat unsur-unsur penipuan di dalam urusan-urusan syarikat yang telah dijalankan oleh tuan. Pihak tuan didapati gagal untuk bertindak secara '*bona fide*' demi kepentingan syarikat.
>
> (ii) Pihak tuan juga didapati telah melakukan perihal 'insiders dealing' di mana pihak tuan telah menyalahgunakan pengetahuan tuan tentang maklumat sulit urusniaga syarikat dan telah gagal memaklumkan kepada pihak syarikat tentang sebahagian urusan-urusan penting berkaitan urusniaga di dalam pengetahuan pihak tuan, Seksyen 132(B).

A (iii) 'Breach of conduct and breach of trust'. Pihak tuan juga didapati melanggar syarat-syarat umum tanggungjawab Pengarah syarikat seperti yang telah dinyatakan di dalam Seksyen 132(1) Akta Syarikat 1965 yang memerlukan pihak tuan sebagai Pengarah syarikat untuk mendahulukan kepentingan syarikat dan mengumumkan secara telus kepentingan tuan atau mana-mana pihak lain yang terbabit di
B dalam urusniaga tersebut kepada pihak syarikat selari dengan Seksyen 135 Akta Syarikat 1965.

[74] According to the evidence of PW3 (Senior Executive Corporate Communication) the plaintiff attempted to serve the notice to the defendant,

C 8. Q: Bagaimanakah notis tersebut diserahkan kepada Defendan?

A: Saya cuba menunggu Defendan bila dia datang ke pejabat kami di Taman Putra Sulaiman supaya saya dapat menyerahkan Notis tersebut secara sendiri kepada Defendan. Tetapi saya dapati Defendan telah tidak hadir untuk melaporkan diri di pejabat sejak bulan September, 2012. Oleh itu saya telah menelefon Defendan sendiri supaya datang mengambil
D notis tersebut dari pejabat kami di Taman Putra Sulaiman. Ini adalah dengan harapan supaya pada masa yang sama, pihak syarikat mempunyai kesempatan untuk mengambil posesi kereta Mercedez milik syarikat Plaintif yang digunakan oleh Defendan. Tetapi Defendan tidak menjawab panggilan telefon saya.

E Oleh sebab itu saya telah mengarahkan kakitangan saya supaya menyerahkan notis tersebut secara sendiri di alamat Defendan seperti yang dinyatakan. Kakitangan saya, walau bagaimanapun tidak berjaya untuk melaksanakan penyerahan notis itu, kerana pintu rumah Defendan tidak dibuka.

F Saya kemudiannya telah mengarahkan kakitangan saya supaya menyerahkan notis tersebut di alamat pejabat Jeraxis iaitu di 10-1, Jalan Jelatek 2, Jelatek Business Centre (Park), 54200 Kuala Lumpur.

Saya telah dimaklumkan bahawa kakitangan Jeraxis enggan menerima notis tersebut.

G Akibat daripada itu, saya telah mengarahkan agar Notis tersebut dihantar secara AR Registered dan saya juga telah dengan sendirinya menghantar notis tersebut melalui fax di No.:603-42521216.

[75] This court finds that there is sufficient evidence adduced by the plaintiff that the defendant had not acted in the best interest of the plaintiff
H by not disclosing the executed agreement knowing full well of the background arrangement and by participating and engaging actively with Jeraxis affairs. As a director of the plaintiff, the defendant has a duty to act in the best interest of the company. By not disclosing his interest in Jeraxis, the defendant had acted for a collateral purpose jeopardising the interest of
I the plaintiff. The defendant should not have put himself in a position where his duty and interest conflict. He must also ensure at all times that the powers entrusted to him must not be exercised for improper purposes.

[76] In coming to a decision in this case, the court has carefully weighed the evidence adduced by all parties, scrutinised the documents tendered and relied on by the parties, as well as considered the written submissions filed by them. On considering the evidence as a whole especially the evidence of all the plaintiff's witnesses *vis-a-vis* the pleadings, and that of the defendant, I am of the considered view that the plaintiff has proved its case on a balance of probabilities. Accordingly, I allowed the plaintiff's claim against the defendant with cost of RM30,000 to the plaintiff.

Damages

[77] The plaintiff in this suit claimed for the following:

(i) Exemplary damages for breach of fiduciary duty in the sum of RM1 million or any other sum to be assessed;

(ii) General Damages for breach of fiduciary duty in the sum of RM500,000 or any other sum to be assessed;

(iii) costs, and

(iv) any other order and/or reliefs.

[78] It is the plaintiff's submission that it had suffered direct loss as a result of not being awarded the catering business. The plaintiff operated the vessel from September 2012 until November 2012. The cost of operation for three months is RM405,000.

[79] The plaintiff further submitted that the defendant must be made accountable for all the unlawful gains that he obtained as a result of the breach of fiduciary duty.

[80] However, the plaintiff failed to adduce any documentary evidence to support its claim for losses suffered as a result of the breach. During the cross-examination, PW1 admitted that the documentary evidence were not before the court.

Q: Re:Q/A 75 WS/PW1 (Supplemental)

Ada apa-apa dokumen Dato' kemukakan berkaitan dengan kerugian ini?

A: Semua ada di pejabat.

Q: Ada annual report syarikat Dato' yang dapat menunjukkan bahawa syarikat mengalami kerugian?

A: Report belum, dalam persiapan.

[81] The High Court in *Lee Sau Kong v. Leow Cheng Chiang* [1960] 1 LNS 56; [1961] 1 MLJ 17 where it quoted with approval the judgment of Lord Goddard in *Bonham-Carter v. Hyde Park Hotel Ltd* [1948] 64 TLR 177, 178 as follows:

A Plaintiffs must understand that if they bring actions for damages it is for them to prove their damages; it is not enough to write down the particulars, and so to speak, throw at the head of the Court, saying:

> This is what I have lost; I ask you to give me these damages. They have to prove it.

B **[82]** Edgar Joseph Jr J in the case of *Popular Industries Ltd v. Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC opined:

> It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can
C recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right.
>
> Thus nominal damages may be awarded in all cases of breach of contract. (See *Marzetti v. Williams* [1830] 1 B & Ad 415. And, where damage is shown but its amount is not proved sufficiently or at all, the court will
D usually decree nominal damages. See, for example, *Dixon v. Deveridge* [1825] 2 C & P 109 and *Twyman v. Knowles* [1853] 13 CB 222.
>
> On the question of the quality of evidence expected of a plaintiff it is well to remember what Devlin J said in *Biggin v. Permanite* [1951] 1 KB 422, 438 namely, "where precise evidence is obtainable, the Court naturally expects
E to have it, where it is not, the Court must do the best it can." Nevertheless, it remains true to say that generally "difficulty of proof does not dispense with the necessity of proof" (see *Aerial Advertising Co v. Batchelors Peas* [1938] 2 All ER 788, 796 per Atkinson J). A case which affords an illustration of the requirement of reasonable certainty in this area is *Ashcroft v. Curtin* [1971] WLR 1731 (CA) in which the plaintiff
F claiming for diminution of profits of his one man business failed in his claim even though the evidence pointed to a decrease in the company's profitability due to the injury, the records produced being too rudimentary and the accounts too unreliable to quantify the loss. So also when, as here, the claim is for the difference between the contract price and a clear and undoubted market price, absolute certainty in proving damages is
G possible and therefore the Court will expect precise evidence to be given. (See para. 345 *McGregor on Damages*, 15th Edn.).

[83] In the instant case before this court, the plaintiff failed to adduce sufficient evidence to prove that they had suffered or experienced financial loss. In respect of the claim of RM5,430,208.29, PW1 could not even
H explain or elaborate. He admitted during the cross-examination that the documents supporting the claims were not in any of the bundle of documents.

[84] The general principles to be considered when making an award of exemplary damages were laid down by Lord Devlin in *Rookes v. Barnard* [1964] AC 1129:

I

> I wish now to express three considerations which I think should always be borne in mind when awards of exemplary damages are being considered. First, the plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour. The anomaly inherent in

exemplary damages would become an absurdity if a plaintiff totally unaffected by some oppressive conduct which the jury wished to punish obtained a windfall in consequence. Secondly, the power to award exemplary damages constitutes a weapon that, while it can be used in defence of liberty, as in the *Wilkes* case (1763), Lofft 1, can also be used against liberty. Some of the awards that juries have made in the past seem to me to amount to a greater punishment than would be likely to be incurred if the conduct were criminal; and moreover a punishment imposed without the safeguard which the criminal law gives to an offender. I should not allow the respect which is traditionally paid to an assessment of damages by a jury to prevent me from seeing that the weapon is used with restraint. It may even be that the House may find it necessary to follow the precedent it set for itself in *Benham v. Gambling* [1941] AC 157, and place some arbitrary limit on awards of damages that are made by way of punishment. Exhortations to be moderate may not be enough. Thirdly, the means of the parties, irrelevant in the assessment of compensation, are material in the assessment of exemplary damages. Everything which aggravates or mitigates the defendant's conduct is relevant.

[85] The Court of Appeal in the case of *Zulkiply Taib & Anor v. Prabakar Bala Krishna & Ors And Other Appeals* [2015] 2 CLJ 766 referred to *McGregor on Damages*, 16th edn, 1997, at p. 306 where it is stated that the matters which the court must properly consider in deciding the quantum of an award of exemplary damages include the following:

... (i) such awards are to be moderate; (ii) the conduct of the parties may properly be taken into account; (iii) the quantum of a compensatory award may influence the quantum of an exemplary award; (iv) the relevance of any criminal penalty (on the basis that "punishing twice for the same misconduct offends against the basic principles of justice ..." p. 310, para. 467).

In the case of *NSW v. Delly* [2007] NSWCA 303, Tobias JA set out the general principles as to exemplary damages (at paras. [85] to [88]). The touchstones are:

(i) The considerations are quite different from compensatory damages and there need be no necessary proportionality between the assessments;

(ii) It is intended to punish the defendant for conduct showing a conscious and contumelious disregard for the plaintiff's rights and to deter him from committing like conduct again;

(iii) The social purpose is to teach a wrongdoer that "tort does not pay";

(iv) It is to assuage any urge for revenge felt by victims and to discourage any temptation to engage in self-help likely to endanger the peace;

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(v) It marks the court's condemnation of the defendant's behaviour; and,

(vi) It is an exceptional remedy which was rarely awarded and then only where there is high-handed, insolent, vindictive or malicious conduct.

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[86] Applying the principles enunciated in the cases mentioned above, this court is of the considered view that the sum of RM250,000 as exemplary damages is reasonable.

Counterclaim

C

[87] The defendant in his counterclaim did not claim any damages for wrongful removal as the COO and director of the plaintiff. The counterclaim is premised on the terms of the working proposal. The defendant did not even tender as evidence the said working proposal. I am satisfied the defendant had failed to prove his counterclaim on the balance of probabilities.

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Therefore, the defendant's counterclaim is dismissed with costs.

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